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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EDITH MACIAS, individually and on  
behalf of similarly situated  
individuals; HOTON DURAN;  
TIFFANY HUYNH; AURA MENDIETA;  
WILLIAM LABOY; MIGUEL ACOSTA;  
CRUZ ACOSTA; CUAUHEMOC  
TORAL; and TERESA VILLEGAS,

Plaintiffs,

vs.

THOMAS J. TOMANEK; and  
MARK GARIBALDI, individually  
and doing business as THE  
GARIBALDI COMPANY,

Defendants.

Case No. C07-3437 JSW

[PROPOSED] ORDER DENYING  
MOTION TO DISMISS BY  
DEFENDANT MARK GARIBALDI,  
INDIVIDUALLY AND DBA THE  
GARIBALDI COMPANY

Hearing:

Date: January 11, 2008  
Time: 9:00 a.m.  
Room: Courtroom of the  
Hon. Jeffrey S. White

Now before the Court is the motion to dismiss plaintiffs' first amended complaint filed by defendant Mark Garibaldi, individually and doing business as The Garibaldi Company, pursuant to Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure. Having reviewed the parties' papers and considered their arguments and the relevant legal authority, and good cause appearing, the motion is HEREBY DENIED.

**A. Legal Standard**

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure

1 tests the legal sufficiency fo the claims alleged in the complaint. The complaint must be  
2 construed in the light most favorable to the plaintiff, Parks Sch. of Business, Inc. v.  
3 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995), and “should not be dismissed . . .  
4 unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of  
5 his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.  
6 Ct. 99, 102 (1957). The court must accept as true all material allegations in the  
7 complaint, as well as reasonable inferences to be drawn from them. Pareto v. FDIC,  
8 139 F.3d 696, 699 (9th Cir. 1998).

9 **B. Motion to Dismiss for Failure to State a Claim.**

10 Defendant’s motion to dismiss for failure to state a claim upon which relief may  
11 be granted is denied because plaintiffs’ first amended complaint alleges the elements  
12 necessary to state a claim for relief under the Racketeer Influenced and Corrupt  
13 Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., based on predicate acts of mail  
14 fraud. Plaintiffs, former tenants of the Rancho Luna & Rancho Sol Apartments, a large  
15 rental complex located in Fremont, California, filed this action against Thomas J.  
16 Tomanek, the owner of the complex, and Mark Garibaldi, individually and doing  
17 business as The Garibaldi Company (collectively referred to as “Garibaldi”), the  
18 property manager.

19 Plaintiffs allege that, upon move-in, they provided Garibaldi with significant  
20 security deposits based on the misrepresentation that they would not be charged for the  
21 ordinary wear and tear on the property and would receive return of the deposits in  
22 compliance with Civil Code § 1950.5. Later, when they vacated the apartments,  
23 plaintiffs allege that they were, in fact, charged for the ordinary wear and tear to the  
24 property, often in amounts greater than security deposit. None of the plaintiffs received  
25 return of their full security deposits. Plaintiffs allege that Garibaldi made  
26 misrepresentations to them to induce them to part with their security deposits, and that  
27 Garibaldi’s subsequent use of the United States mails was foreseeable and in  
28 furtherance of that scheme and the method by which Garibaldi made claim to the

1 security deposits and demanded additional funds.

2 Defendant argues that plaintiffs' first amended complaint must be dismissed with  
3 prejudice because the mailings by Garibaldi did not themselves contain  
4 misrepresentations, and therefore cannot form the basis for mail fraud because they  
5 were not in furtherance of the scheme and plaintiffs could not have been injured by  
6 reliance on them. There is, however, no requirement that the mailings themselves  
7 contain misrepresentations, only that they be made in furtherance of a scheme to  
8 defraud. Schmuck v. United States, 489 U.S. 705, 710-11 (1989). Here, plaintiffs  
9 allege that they relied on misrepresentations made by Garibaldi, and that the  
10 subsequent mailings were in furtherance of Garibaldi's scheme to defraud. That is  
11 sufficient to state the RICO predicate act of mail fraud.

12 Defendant also argues that plaintiffs have failed to allege a RICO pattern  
13 because the mailings described in the complaint were made within a three-month  
14 period. However, the scheme to defraud as alleged by plaintiffs, pursuant to which  
15 defendant used the mails, extended over a number of years. The scheme, as alleged,  
16 also was part of Garibaldi's regular way of doing business, thus giving rise to the  
17 inference that the alleged fraudulent scheme would continue into the future.

18 To prove a pattern of racketeering activity a plaintiff must show that the  
19 racketeering predicates are related, and that they amount to or pose a threat of  
20 continued criminal activity. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229,  
21 239 (1989). Conduct is related if it embraces acts that have "the same or similar  
22 purposes, results, participants, victims, or methods of commission, or otherwise are  
23 interrelated by distinguishing characteristics and are not isolated events." Id., (citation  
24 omitted). Continuity may be shown over a closed period by proving a series of related  
25 predicate acts extending over a substantial amount of time (not a few weeks or  
26 months). Id. at 241-42. Open-ended continuity is shown by "past conduct that by its  
27 nature projects into the future with a threat of repetition." Id. at 241. Predicate acts that  
28 specifically threaten repetition or that become a "regular way of doing business" satisfy

1 the open-ended continuity requirement. Id. at 243. In this case, plaintiffs have alleged  
2 facts sufficient to show both closed and open-ended continuity.

3 Defendant also argues that plaintiffs have failed to plead an actionable RICO claim  
4 because they do not allege that they relied on the mailings to their detriment, or that  
5 they were induced to part with any money as a result of the mailings. However,  
6 plaintiffs do allege that they relied on the representations made by Garibaldi at the time  
7 they entered into their lease agreement, that those representations were false or made  
8 with reckless disregard of their falsity, that Garibaldi used the mails in furtherance of  
9 this scheme, and that plaintiffs suffered injury, including injury to their property, as a  
10 result of Garibaldi's RICO violation. Those allegations are sufficient to allege that  
11 Garibaldi's racketeering activities proximately caused plaintiffs' injuries.

12 For all of the forgoing reasons, Garibaldi's motion to dismiss pursuant to Rule  
13 12(b)(6) is denied.

14 **C. Motion to Dismiss for Lack of Subject Matter Jurisdiction.**

15 In light of the Court's denial of Garibaldi's motion to dismiss plaintiffs' RICO  
16 claims, his motion to dismiss plaintiffs' supplemental state law claims is denied. As  
17 alleged, those state law claims form one case or controversy with the RICO claims, and  
18 therefore are appropriately before the Court. 28 U.S.C. § 1367(a).

19  
20 **IT IS SO ORDERED.**

21 Dated: \_\_\_\_\_

22 \_\_\_\_\_  
23 JEFFREY S. WHITE  
24 UNITED STATES DISTRICT JUDGE  
25 Elizabeth Brancart  
26 Attorneys for Plaintiffs  
27  
28

**PROOF OF SERVICE**

I am over the age of 18 and am not a party to the within action. My business address is 8205 Pescadero Road, Loma Mar, California 94021.

On November 12, 2007, I served a true and correct copy of the following document(s):

**[PROPOSED] ORDER DENYING MOTION TO DISMISS BY DEFENDANT MARK GARIBALDI, INDIVIDUALLY AND dba THE GARIBALDI COMPANY**

upon the following person(s):

Ms. Sara Allman, Allman & Nielsen, 100 Larkspur Landing Circle, Suite 212  
Larkspur, CA 94939; and

Mr. John S. Blackman, Farbstein & Blackman, 411 Borel Ave., Suite 425, San  
Mateo, CA 94402

	<b>BY HAND DELIVERY:</b> By causing such document(s) to be delivered by hand to the above person(s) at the address(es) set forth above.
	<b>BY MAIL:</b> By placing a copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Loma Mar, California, addressed as set forth above.
	<b>BY THIRD-PARTY COMMERCIAL CARRIER (OVERNIGHT DELIVERY):</b> By delivering a copy thereof to a third-party commercial carrier, addressed as set forth above, for delivery on the next business day.
	<b>BY FACSIMILE:</b> By transmitting the above document(s) to the facsimile number(s) of the addressee(s) designated above.
xx	<b>BY ELECTRONIC TRANSMISSION OF THE "NOTICE OF ELECTRONIC FILING:"</b> By electronically filing the document(s) (All counsel are "Filing Users")

I certify that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 12, 2007, at Loma Mar, California.

/s/ Elizabeth Brancart  
Elizabeth Brancart